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No. 85-298

In The
Supreme Court of the United States
October Term, 1985

JOHN F. CONNOLLY,

Petitioner,

vs.

ANDREW K. BURT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Respondent, Andrew K. Burt, respectfully requests that the Petition For Writ of Certiorari not be issued in order to review the judgment and opinion of the United States Court of Appeals For the Tenth Circuit entered in this proceeding on March 20, 1985. In the interests of brevity, clarity, and continuity of thought, Respondent is satisfied with the Petitioner's presentation

of the question presented for review, citations to the opinions in the Courts below, the statement of the grounds on which the jurisdiction of this Court is invoked, and the constitutional and statutory provisions which this case involves; and therefore, elects not to include the foregoing requirements within this Brief pursuant to U.S. Sup. Ct. Rule 34.2, 28 U.S.C.A.

—o—

STATEMENT OF THE CASE

Andrew K. Burt, the Respondent (Plaintiff below), is a medical doctor and a 1977 graduate of the Residency Program in Orthopaedic Surgery at the University of Nebraska Medical School. During Dr. Burt's entire residency, he never received one failing grade, an unsatisfactory report of any kind, or even any negative feedback about the adequacy of his work.

In 1980, upon moving to Colorado, Dr. Burt wished to start a practice in orthopaedic medicine. He applied for staff privileges at several Colorado hospitals. Dr. Burt, however, was summarily denied privileges in each case, thus being unable to set up his practice in orthopaedic surgery. The denial of privileges at these Colorado hospitals was due to a letter written on October 21, 1980 by Dr. John F. Connolly, Chairman of the Department of Orthopaedics at the University of Nebraska College of Medicine, the Petitioner herein. Said letter, included as Appendix D, was written to at least one Colorado hospital, and stated unequivocally that Dr. Burt was incapable of serving adequately within the field of Orthopaedic Sur-

gery. The letter was purposefully written with knowledge and intent that it would be published in Colorado and negatively influence those parties to which it was sent. It succeeded in grievously injuring Dr. Burt's career and impugning his professional reputation.

Respondent brought suit against the Board of Regents of the University of Nebraska and John F. Connolly in the District Court For the District of Colorado on claims of defamation, breach of contract, interference with prospective advantages and outrageous conduct. The District Court granted the Board of Regents' Motion to Dismiss, reasoning that it was immune under the Eleventh Amendment. In addition the Court held it had no personal jurisdiction over Dr. Connolly. Plaintiff appealed the jurisdictional issue, alone, against Dr. Connolly, to the United States Court of Appeals For The Tenth Circuit. The Tenth Circuit, reversing the District Court's ruling, distinguished the defamation found in *Calder v. Jones,* 104 S.Ct. 1482 (1984), by stating:

> [H]ere the alleged defamation resulted from a single letter, we do not find this distinction significant in view of the Court's repeated emphasis in *Calder* on the intentional nature of the defendant's conduct and its calculated injurious effect on the forum state.

Opinion below at 245; Appendix A at App. 6.

Thus, the Court of Appeals relied on this Court's decisions in *Keeton v. Hustler Magazine, Inc.,* 104 S.Ct. 1473 (1984) and *Calder v. Jones,* 104 S.Ct. 1482 (1984), by carefully examining the facts and the nature of the harm in-

flicted, thus arriving at a just and fair decision in harmony with the constitutional fairness standards of the Due Process Clause of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

In order to examine whether the Federal District Court had *in personam* jurisdiction over Defendant, Dr. John F. Connolly, this Court must first look to whether jurisdiction is authorized by Colorado law. It was conceded by Defendant in his Brief below and stated by that Court in its Order that Dr. Connolly was within the reach of Colorado's long-arm statute, C.R.S. § 13-1-124 (1973). The only other inquiry before this Court regarding jurisdiction is whether an application of C.R.S. § 13-1-124 (1973) over Dr. Connolly is a violation of the Due Process Clause of the Fourteenth Amendment. Drawing from the recent cases of *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473 (1984) and *Calder v. Jones*, 104 S.Ct. 1482 (1984), it is clear that individuals who purposefully and intentionally inflict injury within the forum state will be subject to prosecution in that state even if physical contacts with that forum are indeed at a minimum. Dr. Connolly is clearly within the constitutional reach of the Colorado Courts. When Dr. Connolly wrote the defamatory letter addressed to a Colorado hospital, he knew that he would be libeling Respondent in the State of Colorado and furthermore knew that he was causing important consequences within this State.

REASONS FOR OPPOSING THE ISSUANCE OF THE WRIT

I. The Facts in the Instant Action Indicate that Petitioner Has Failed to Satisfy All of the Criteria Necessary to Subject a Non-Resident to the Personal Jurisdiction of the Federal Courts in Colorado.

International Shoe Co. v. Washington, 326 U.S. 310 (1945) and its progeny provide a solid analytical foundation upon which every personal jurisdiction claim may be determined. Thus, in the instant action, the opinion of the United States Court of Appeals For The Tenth Circuit and the recent decisions of *Keeton* and *Calder* weigh heavily in favor of bringing Dr. Connolly, the Petitioner herein, within the ambit of Colorado's long-arm statute and the due process requirements of the Fourteenth Amendment of the United States Constitution.

It is universally accepted that two criteria must be satisfied before a state statute can confer jurisdiction over a non-resident defendant. First, the Court must determine if the defendant is amenable to service under the long-arm statute of the forum State. Second, the exercise of personal jurisdiction over the non-resident must comport with the Due Process Clause of the Fourteenth Amendment. *International Shoe Co. v. Washington,* 326 U.S. 310 (1945).

Regarding the initial requirement, actions of the Petitioner clearly come within the purview of Colorado's long-arm statute, C.R.S. § 13-1-124(1)(b) (1973), which provides that a non-resident is subject to the jurisdiction of the Colorado courts on any claim arising from the "[c]ommission of a tortious act within this state." In fact, the Court of Appeals, the District Court, and Peti-

tioner himself, in his Memorandum ~~in~~ Support of Motion to Dismiss, acknowledged that jurisdiction over Dr. Connolly is in accordance with the language of C.R.S. § 13-1-124. *See,* Brief of Appellee at 13, *Burt v. Board of Regents of University of Nebraska,* 757 F.2d 242 (10th Cir. 1985).

Thus the inquiry is reduced solely to the issue of whether the assertion of jurisdiction over the Petitioner is constitutionally within federal court interprtations of the Due Process Clause of the Fourteenth Amendment.

Initially one must note that the Petitioner neglected to recognize basic tenets upon which the exercise of personal jurisdiction is based. For instance, it is well settled that the commission of a tort within a state includes extra-territorial acts that produce actionable consequences within the forum. The seminal case of *Gray v. American Radiator & Standard Sanitary Corp.,* 22 Ill.2d 432, 176 N.E.2d 761 (1961) is often credited with extending personal jurisdiction over out-of-state actors who cause tortious consequences within a forum State. In *Gray,* jurisdiction was upheld over a foreign corporation that had no agents in Illinois, transacted no business in Illinois, maintained no office in Illinois and sold no products in Illinois. The defendant had manufactured a safety valve in Ohio, which was used in a water heater made in Pennsylvania and purchased by the plaintiff in Illinois. The safety valve was defective, causing the water heater to explode, injuring the plaintiff. The fact that defendant expected at least some of the valves would be used in Illinois was sufficient to require the corporation to defend in that State.

The Colorado Courts are especially willing to find jurisdiction proper over nonresident defendants who pur-

posefully commit tortious acts within the State. *Ruggieri v. General Well Services, Inc.*, 535 F.Supp. 525 (D.Colo. 1982). In *Jenner & Block v. District Court*, 197 Colo. 184, 590 P.2d 964 (1979), Judge Carrigan, speaking for the Court, stated:

> Allegations that a defendant's acts in another State ultimately caused injury in Colorado, and thus constituted a tort here, suffice as a prima facie showing of the threshold jurisdiction. (citations omitted) The non-resident tortfeasor need have no additional contacts in this State to satisfy due process requirements. (at p. 966)

Id. at 185, 590 P.2d 966 (1979).

If Dr. Connolly had struck a physical blow upon a Colorado resident there would be no question of his amenability to prosecution within the Colorado Courts. There appears no distinction between the physical actions stated above and the malicious and purposeful actions of Dr. Connolly, which in effect constituted a blow to Dr. Burt's reputation and career. It should be noted that the purposeful nature of Dr. Connolly's actions is the conduit to jurisdiction in Colorado. Thus, an inquiry as to whether Dr. Connolly does any business within Colorado strays from the relevant issue in this case.

Petitioner would have this Court believe that the Court of Appeals adopted a "misplaced reliance" on *Keeton* and *Calder* in reaching its decision below. In *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473 (1984), a New York resident sued Hustler Magazine, Inc., an Ohio corporation, with its principal place of business in California, in the United States District Court for the District of New Hampshire, alleging the tort of libel in her complaint.

More specifically, Keeton claimed she was libeled in five separate issues of defendant's magazine of which some 10 to 15,000 copies reached the forum State each month. This Court, in reversing the decision of the lower courts, held that the defendant's commission of a tort within New Hampshire satisfied the jurisdictional requirements of both the New Hampshire long-arm statute and the minimum contacts required under the Due Process Clause. U.S. Const. amend. XIV § 1. Petitioner asserts that *Keeton* "*relied exclusively* on the regular systematic and extensive circulation of a national publication in the forum State to extend jurisdiction under New Hampshire's long-arm statute." Petition For Writ of Certiorari at 8, *Connolly v. Burt* (August 22, 1985 No. 85-298) (emphasis added). However, more significantly, Petitioner apparently failed to consider the element of intentional conduct, that pervades the actions of the nonresident defendants in both *Keeton* and *Calder*. The Court in *Keeton* did not necessarily rely on the fact that the defendant magazine sold some 10 to 15,000 copies of its magazines per month in New Hampshire. Rather, the Court's emphasis on the intentional infliction of injury through the magazine's distribution, which could in no way be characterized as "random," "isolated," or "fortuitous" stands as paramount in *Keeton*. *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473, 1478 (1984). The parallel to the instant case should be self-evident.

Additionally, Petitioner's attempt to distinguish *Calder v. Jones*, 104 S.Ct. 1482 (1984) must also fail. *Calder* involved a suit brought by a professional entertainer, Shirley Jones, in the California Superior Court alleging she had been libeled in an article written and edited by

the defendants, and published in The National Enquirer, a national publication. The California Court of Appeals reversed the Superior Court's decision to quash service of process for lack of jurisdiction. This Court affirmed, holding that jurisdiction is proper where defendants intended to and did cause tortious injury in California. Justice Rehnquist, writing for the Court in *Calder v. Jones,* 104 S.Ct. 1482 (1984), stated:

> Petitioners (magazine editor and writer) are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California . . . an article they knew would have a potentially devasting impact upon Respondent. And they knew that the brunt of the injury would be felt by respondent in the State in which she lives and works . . . .

Id. at 1487.

Again, the similarity to the instant action is clear. Dr. Connolly was the primary participant in a wrongdoing intentionally directed at a Colorado resident, impugning the professional reputation of a doctor whose career was then centered in Colorado.

Secondly, Petitioner misperceives the import of the quote in *Calder,* relied upon in Judge Seth's dissent to the opinion below, that "California is the focal point of the story and of the harm suffered." *Calder v. Jones,* 104 S.Ct. 1482, 1487 (1984). Although Petitioner agrees that the "harm suffered" may have occurred in Colorado, he overemphasizes the significance of the "focal point of the story." Petitioner may have sent the letter from Nebraska, but he did not rely upon information received in Nebraska. Indeed Petitioner relied on his own personal

bias. The true focal points of the story were therefore the recipients of the letter those individuals in Colorado who were thereby influenced and refused to grant staff privileges to Dr. Burt.

Thirdly, Petitioner's reliance on *Burger King Corp. v. Rudzewicz,* 105 S.Ct. 2174 (1985), is somewhat incongruous. In *Burger King* this Court actually extended personal jurisdiction over an "out of state" actor in a franchise dispute. *Burger King* emphasized the "purposeful availment" requirement which "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random', 'fortuitous,' or 'attenuated' contacts." *Burger King v. Rudzewicz,* 105 S.Ct. at 2183. It is perplexing to surmise, however, that a letter purposefully aimed at specific hospitals in Colorado is a random, fortuitous or attenuated event, as Petitioner suggests. Dr. Connolly, by deliberately and proximately causing the commission of a tort in Colorado, has purposefully availed himself of the "benefits and protections" of Colorado law. Likewise, the "quality and nature" of Petitioner's relationship in Colorado can, in no sense, be viewed as random, fortuitous and attenuated. By eschewing a simple disclosure of facts, as requested by the hospital considering Dr. Burt's application for staff privileges, and dealing an intentional, malicious blow to Respondent's professional competency and personal integrity, Petitioner invited the extension of Colorado's long-arm statute to include himself.

Moreover, the Court in *Burger King* lists "considerations" which "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Burger King*

Corp. v. Rudzewicz, 105 S.Ct. at 2184, (1985). These factors include, *inter alia,* "the forum State's interest in adjudicating the dispute," "plaintiff's interest in obtaining convenient and effective relief," and the "shared interest of the several States in furthering fundamental social policies." *Burger King Corp. v. Rudzewicz,* 105 S.Ct. at 2184.

In the instant action, it is beyond dispute that Colorado has a significant interest in redressing injuries that occur within the State. As stated by Justice Rehnquist,

> A State has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a State seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort.

Keeton v. Hustler Magazine, Inc., 104 S.Ct. 1473, 1479 (1984) (quoting Restatement (Second) of Conflict of Laws § 36 comment e (1972)).

Keeton is particularly instructive in balancing the competing factors which influence minimum contracts inquiry. For instance, the Court held that:

> [T]he reputation of the libel victim may suffer harm even in a State in which he has hitherto been anonymous. The communication of the libel may create a negative reputation among the residents of a jurisdiction where plaintiff's previous reputation was, however small, at least unblemished.

Keeton v. Hustler Magazine, Inc., 104 S.Ct. at 1479.

The Court also noted New Hampshire's "substantial interest in cooperating with other States" in order to "efficiently [litigate] all issues and damage claims arising out of libel, in a unitary proceeding." *Keeton,* 104 S.Ct.

at 1480. Surely, Colorado must have a "manifest interest in providing effective means of redress for its residents." *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957).

Furthermore, since the injury was felt entirely by a Colorado resident, forcing Respondent to travel to Nebraska would not advance Plaintiff's "interest in obtaining convenient and effective relief." All of the witnesses to the *effect* of the letter reside in Colorado. The witnesses likely to be called at trial, those individuals possessing knowledge and information with regard to the content of the letter, are in Colorado. *See Brown v. Flowers Industries, Inc.*, 688 F.2d 328, 334 (5th Cir. 1982) (personal jurisdiction predicated on one long distance phone call constituting a tort within the forum State). Lastly, Petitioner has failed to show how the exercise of jurisdiction in Colorado contravenes Nebraska's "fundamental substantive social policies."

In conclusion, Petitioner's bald assertion that the Court of Appeals applied a "talismanic jurisdictional formula" is simply peradventure. The facts of the instant action, when laid bare, indicate that Petitioner has "certain minimum contacts" with Colorado through commission of a tort within this forum. The Court of Appeals, in examing the facts of this case, decided that extension of personal jurisdiction comports with fair play and substantial justice; therefore, this interpretation of the minimum contacts doctrine should stand as a just and proper resolution of the inquiry.

II. The Petition For Writ of Certiorari Disregards the Intentional Conduct of the Petitioner.

Petitioner reasons that the extension of jurisdiction over an out-of-state doctor would result in the chilling effect of making a doctor eligible for litigation anywhere in the world, or alternatively create a flood of incompetent doctors within this nation's hospitals. Therefore, Petitioner urges the prophylactic measure of rejecting jurisdiction in this case.

Petitioner in alleging these policy "considerations," grossly misperceives the pertinent facts of this case. Dr. Burt, as his uncontroverted Affidavit filed in this matter establishes, studied directly under Dr. Connolly at the University of Nebraska, passed all of Dr. Connolly's courses, never received any negative comments concerning his performance, and graduated with a Certificate of Residency signed by Dr. Connolly himself. On the other hand, the letter written by Dr. Connolly does not merely describe Dr. Burt as "below average," but unequivocably states that Dr. Burt could not serve adequately in the field of orthopaedic surgery. The fact that Petitioner persists in fueling fears of pervasive incompetency within the medical profession only aids in diverting the attention of the Court from the critical issues of this case, the intentional and malicious conduct of Dr. Connolly. It is indisputable that Dr. Connolly, an experienced orthopaedic surgeon, knew that his letter of October 21, 1980 would ruin the career and professional reputation of Dr. Burt, a career which Dr. Connolly had formerly sanctioned. In effect, the letter revoked Dr. Burt's license to practice orthopaedic surgery, without notice to Dr. Burt, or the right to be heard, and thus, without affording Dr. Burt minimal due process.

The Petition For Writ of Certiorari noticeably avoids mention of the malicious nature of Dr. Connolly's actions. Dr. Connolly did not merely comment on Dr. Burt's medical knowledge, technical proficiency, medical judgment, personal habits, morals, ethics, etc., as requested, rather, he leaped across the line between criticism and defamation, by purposefully writing a defamatory letter regarding Dr. Burt's total incompetency as an orthopaedic surgeon. Connolly knew that this letter was untrue, he knew that the letter would create a stigma on Dr. Burt's professional reputation and he knew the letter would ruin Dr. Burt's career. Obviously, the letter of Dr. Connolly manifests a personal vendetta against Dr. Burt and subverts the true purpose of a request for recommendation in the medical profession. Rather than placing a chill upon responses for requests for recommendation, a finding in favor of Dr. Connolly would grant those in powerful positions a license to defame former students. Indeed, that license is exactly what Dr. Connolly requests this Court sanction.

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CONCLUSION

For the reasons stated above, Respondent respectfully requests that the Petition For Writ of Certiorari to the Court of Appeals for the Tenth Circuit not be granted.

Respectively submitted,

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DATED THIS 1st DAY OF NOVEMBER, 1985.

APPENDIX A

Andrew K. BURT, Plaintiff-Appellant,

v.

The BOARD OF REGENTS OF the UNIVERSITY OF NEBRASKA and John F. Connolly, Defendants-Appellees.

No. 82-2378.

United States Court of Appeals, Tenth Circuit.

March 20, 1985.

Rehearing Denied June 17, 1985.

Reversed and remanded.

Seth, Circuit Judge, dissented and filed an opinion.

F. James Donnelly of Hannon, Stutz, Dyer & Miller, Denver, Colo. (Robert J. Dyer III, Denver, Colo., with him on the brief), for plaintiff-appellant.

Thomas L. Roberts of Pryor, Carney & Johnson, P.C., Englewood, Colo. (Susan T. Smith, Englewood, Colo., with him on the brief), for defendants-appellees.

Before SEYMOUR and SETH, Circuit Judges, and ANDERSON,* District Judge.

SEYMOUR, Circuit Judge.

Andrew K. Burt, a Colorado resident at the time this action was filed, brought suit against the Board of Regents of the University of Nebraska and John F. Con-

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* Honorable Aldon J. Anderson, Chief Judge, United States District Court for the District of Utah, sitting by designation.

nolly, Chairman of the Department of Orthopedic Surgery at the University. Dr. Burt, a medical doctor, had completed a residency program in orthopedic surgery under Dr. Connolly at the University. Dr. Burt subsequently applied for staff privileges at several Colorado hospitals, which directed inquiries to Dr. Connolly about Dr. Burt's orthopedic residency and general medical competence. Dr. Connolly responded with a very unfavorable letter and Dr. Burt was denied staff privileges. Dr. Burt filed this suit seeking damages for defamation, breach of contract, interference with prospective advantage, outrageous conduct, and the deprivation of property and liberty interests protected by the United States Constitution. The district court granted defendants' motions to dismiss, ruling that the Board of Regents was immune under the Eleventh Amendment, and that the court did not have personal jurisdiction over Dr. Connolly. Dr. Burt appeals the jurisdictional issue, and we reverse.[1]

Dr. Burt alleges in his complaint that the statements by Dr. Connolly were false, willful and wanton, made with malice, and published in Colorado. He further alleges that as a result of these statements he was unable to practice medicine in Colorado. Dr. Burt asserts that the court

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1. Dr. Burt does not appeal the district court's ruling that the Board was immune. As an alternative ground for affirming the dismissal as to him, Dr. Connolly urges on appeal that he also is immune under the Eleventh Amendment. In addition, he contends that Nebraska is a more convenient forum for this action. These issues were not the basis for the district court's disposition and we do not address them here. Dr. Connolly is of course free to present these arguments to the district court on remand.

has personal jurisdiction over Dr. Connolly pursuant to Colorado's long-arm statute,[2] which provides in pertinent part:

> "Engaging in any act enumerated in this section by any person, whether or not a resident of the state of Colorado, either in person or by an agent, submits such person, and if a natural person his personal representative to the jurisdiction of the courts of this state concerning any cause of action arising from:
>
> . . . . .
>
> The commission of a tortious act within this state. . . ."

Colo.Rev.Stat. § 13-1-124(1) (b) (1973).

In response, Dr. Connolly filed an affidavit asserting that he is a resident of Nebraska and that he has never done business of any kind in Colorado. Dr. Connolly further states that he owns no property in Colorado and was never physically present in Colorado in connection with the claim asserted by Dr. Burt.

The Colorado long-arm statute was intended to extend the jurisdiction of the Colorado courts to the fullest extent permitted by the due process clause of the United States Constitution. *Behagen v. Amateur Basketball Association of America,* 744 F.2d 731, 733 (10th Cir.1984). In this case the district court concluded that the action was technically within the reach of the long-arm statute because the alleged tort of defamation occurred in Colo-

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2. In diversity cases, the federal district court's jurisdiction is co-extensive with that of the state courts. See Fed.R.Civ.P. 4(c).

rado.[3] The court held, however, that personal jurisdiction over Dr. Connolly was precluded by the requirements of federal due process because he lacked sufficient minimum contacts with the forum state.

Subsequent to the district court's decision below, the Supreme Court decided *Keeton v. Hustler Magazine, Inc.*, — U.S. —, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984), and *Calder v. Jones*, — U.S. —, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). We believe these two cases require us to reverse the district court's conclusion in this case.

The Court in both *Keeton* and *Calder* recognized that "[i]n judging minimum contacts, a court properly focuses on 'the relationship among the defendant, the forum, and the litigation.'" *Keeton*, 104 S.Ct. at 1478 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2579, 53 L.Ed.2d 683 (1977)); *Calder*, 104 S.Ct. at 1486 (same). The plaintiff in *Keeton*, a New York resident, brought a libel action in New Hampshire against Hustler Magazine, an Ohio corporation with its principal place of business in California. The only connection between either the plaintiff or the magazine and New Hampshire was the sale in that state of the allegedly libelous material. In upholding personal jurisdiction, the Court agreed "that the 'fairness' of haling respondent into a New Hampshire court depends to some extent on whether respondent's activities relating to New Hampshire are such as to give that State a legitimate interest in holding respondent answerable on a claim related to those activities." 104 S.Ct. at 1479. The Court then concluded:

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3. "The tort of libel is generally held to occur wherever the offending material is circulated." *Keeton v. Hustler Magazine, Inc.*, — U.S. —, 104 S.Ct. 1473, 1479, 79 L.Ed.2d 790 (1984) (citation omitted).

> "'"A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort."' *Leeper v. Leeper,* 114 N.H. 294, 298, 319 A.2d 626, 629 (1974) (quoting Restatement (Second) of Conflict of Laws § 36, Comment e (1971).
>
> This interest extends to libel actions brought by nonresidents. False statements of fact harm both the subject of the falsehood *and* the readers of the statement. New Hampshire may rightly employ its libel laws to discourage the deception of its citizens."

Id. Under *Keeton,* Colorado has a significant interest in the present case.

In *Calder,* a California resident brought a libel suit in California state court against, inter alia, two employees of a national magazine who were residents of Florida and who had prepared the alleged libelous magazine article in Florida. The California Court of Appeals held that personal jurisdiction over the Florida residents was proper. The Supreme Court noted:

> "[T]he [California] court concluded that a valid basis for jurisdiction existed on the theory that [the defendants] intended to, and did, cause tortious injury to respondent in California. The fact that the actions causing the effects in California were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising out of those effects."

Calder, 104 S.Ct. at 1485-6 (footnote omitted). The Supreme Court affirmed, approving the "effects" test em-

ployed by the California court. *See id.* at 1486 n. 6. The Court concluded that "[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California," *id.* at 1487, and held that "jurisdiction over [the Florida residents] in California is proper because of their intentional conduct in Florida calculated to cause injury to [the plaintiff] in California," *id.* at 1488.

We believe this analysis is dispositive of the jurisdictional issue in this case. Although the libel in *Calder* was pursuant to a commercial enterprise, whereas here the alleged defamation resulted from a single letter, we do not find this distinction significant in view of the Court's repeated emphasis in *Calder* on the intentional nature of the defendants' conduct and its calculated injurious effect in the forum state. The Court in *Calder* was unpersuaded by the arguments of the defendant reporter and the defendant editor that they personally had no economic stake in their employer's sales in a distant state.

> "[P]etitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works. . . ."

Id. at 1487.

Nor are we persuaded by Dr. Connolly's claim that it violates due process to hale him into court in Colo-

rado because the letter was, in effect, solicited by Dr. Burt, who gave Dr. Connolly's name to the hospitals. Dr. Burt solicited a letter of reference; he did not solicit a malicious falsehood. Taking Dr. Burt's allegations as true, as we must on a motion to dismiss, we hold that no due process notions of fairness are violated by requiring one who intentionally libels another to answer for the truth of his statements in any state where the libel causes harm to the victim. To the extent that Dr. Connolly's statements damaged Dr. Burt's reputation and his ability to practice his profession, the damage occurred in Colorado.

Accordingly, we conclude that the district court erred in its determination that it lacked personal jurisdiction over Dr. Connolly. The judgment is reversed on that ground and remanded for further proceedings.

SETH, Circuit Judge, dissenting:

I must respectfully dissent.

The majority relies entirely on *Calder v. Jones*, — U.S. —, 104 S.Ct. 1482, 79 L.Ed.2d 804, but in my view we have only half the elements relied on by the Court in *Calder*. There, the opinion places emphasis on the fact that the story concerned what the plaintiff did in California. Thus: "The allegedly libelous story concerned the California activities of a California resident." The Court also stated that the "article was drawn from California sources." The Court then stated the two elements:

> "In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the 'effects' of their Florida conduct in California. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 [100 S.Ct. 559, 62 L.Ed.2d 490]. . . ."

The Court so applies the "effects" theory where both "the focal point . . . of the story and of the harm" was in California.

In the case before us the letter was, of course, sent to Colorado but the "focal" point of the story was Nebraska. The letter was about what had taken place in Nebraska not Colorado. The story was certainly not drawn from Colorado sources. The action was initiated by plaintiff. We thus have but half a *Calder*. The opinion in *Calder* quotes and relies on the usual minimum contact cases with no comment or criticism. It states at the outset of the opinion of the defendant:

> "It publishes a national weekly newspaper with a total circulation of over 5 million. About 600,000 of those copies, almost twice the level of the next highest State, are sold in California."

The Court in a footnote quoted the exact circulation figures for the issue, 5,292,200 total and 604,431 in California. The Court had stated at the outset that:

> "The article was published in a national magazine with a large circulation in California."

The opinion contains a mixture of the minimum contact facts, minimum contact cases, and the "effects" theory. Thus it should be assumed that the "effects" basis referred to by the Court is operative in the context of the minimum contacts doctrine as pressed in the case therein quoted, *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 100 S.Ct. 559. Thus "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *See also* our cases such as *Premier Corp. v. Newsom,*

620 F.2d 219 (10th Cir.), and *Anderson v. Shiflett,* 435 F.2d 1036 (10th Cir.), where in a specific jurisdiction case we required the minimum contact. *See also* the unilateral activity case, *Hanson v. Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283. The unilateral activity of plaintiff was the solicitation in Colorado of the letter of recommendation from defendant in Nebraska. This action necessarily drew the response from defendant to Colorado. *See also Anderson v. Shiflett,* 435 F.2d 1036 (10th Cir.).

Again, the "story" was about what had taken place in Nebraska not Colorado. The *only* connection or contact the defendant had with Colorado was the letter he sent to the Colorado hospital in response to its request that he express an opinion as to the plaintiff's "medical knowledge, technical proficiency," and other qualifications. The plaintiff acknowledges that defendant had a duty to reply and that the hospital solicited the information. It is apparent that this solicitation can also be attributed to the plaintiff.

Again, the letter in issue was a required answer to the inquiry as to Dr. Burt's performance as an orthopedic resident in Nebraska, thus was not unsolicited or gratuitously made. Instead, the action was initiated by plaintiff. The majority opinion at page 245 quotes from *Calder* (104 S.Ct. 1482, at 1487), as to the brunt of the injury and impact on respondent. However, the sentence quoted in part continued with "and in which the *National Enquirer* has its largest circulation." The Court then continued:

> "Under the circumstances, petitioners must 'reasonably anticipate being haled into court there' to answer for the truth of the statements made in their article."

"Under these circumstances" thus includes the extent of the circulation in California and thus the contacts of defendants. The traditional cases were quoted following the above quotation. Again, we have the "contact" ingredient or element of what the Court calls the "impact." It is an impact theory but in a minimum contact context.

The trial court in its evaluation of the facts found that there was no factual basis for *in personam* jurisdiction over the plaintiff. It must be assumed that this included all the elements and thus a determination that the defendant could not anticipate being haled into court in Colorado. The trial court's findings are presumed to be correct. The jurisdictional issue requires and is based on an evaluation of the facts.

Keeton v. Hustler Magazine, Inc., — U.S. —, 104 S.Ct. 1473, 79 L.Ed.2d 790, was decided on the same day as was *Calder*. The contacts aspect was treated at some length. The Court referred to the regular monthly sales of thousands of magazines in New Hampshire and said this "cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous." Thus there were sufficient "minimum contacts" between defendant and the State to meet due process requirements, quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559. The Court in *Keeton* was concerned with the relationship of the plaintiff to the forum State and the First Amendment issue. However, on the contacts element the Court said of the magazine:

> "But respondent is carrying on a 'part of its general business' in New Hampshire, and that is sufficient to support jurisdiction when the cause of action arises

> out of the very activity being conducted, in part, in New Hampshire."

The Court said also that the harm was done in New Hampshire and there is "no justification" for restricting libel actions to defendant's forum, and:

> "The victim of a libel, like the victim of any other tort, may choose to bring suit in any forum with which the defendant has 'certain minimum contacts . . . such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Milliken v. Meyer,* 311 U.S. 457, 463 [61 S.Ct. 339, 342, 85 L.Ed. 278].'"

(The Court there quoted *International Shoe.)*

Thus the Court in *Keeton* in what appears to be a specific jurisdictional case or impact case includes the minimum contact doctrine. Again, we must assume that the "impact" theory is appropriate when found in the context of minimum contacts.

As the Court did in *Calder* and *Keeton,* and in our earlier cases, the contacts of the plaintiff with the forum State must be examined. This was again emphasized by the majority and the dissent in *Helicopteros Nacionales de Colombia v. Hall,* — U.S. —, 104 S.Ct. 1868, 80 L.Ed.2d 404, which followed *Keeton* and *Calder.*

In a challenge to *in personam* jurisdiction the plaintiff has the burden of showing the basis for jurisdiction. This is not a heavy burden, but reliance cannot be placed on unsupported allegations in the complaint. These allegations are not taken as true under these circumstances in view of the burden.

In 2 Moore's Federal Practice ¶ 4.41-1[3], at 4-473 (2d ed.), the authors state:

> "On appeal, the trial court's findings on the jurisdictional question are presumptively correct and will be set aside only if clearly erroneous. Even where the trial court reached its decision on the basis of affidavits and other documentary evidence, and did not weigh conflicting evidence or evaluate witness credibility, the standard of review on appeal is the same. The court on appeal will not draw its own inferences and conclusions from the facts in the record."

A footnote quotes our *Quarles v. Fuqua Industries, Inc.*, 504 F.2d 1358 (10th Cir.).

The trial judge's evaluation of the facts developed by the affidavits should be considered as any other fact determination. The weighing of the facts is necessary in the determination of jurisdiction. *Kulko v. California Superior Court,* 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132.

I would affirm the judgment of the trial court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-JM-1850

ANDREW K. BURT,

Plaintiff,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA and JOHN F. CONNOLLY,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed October 1, 1982)

This case is before me upon motions to quash service and dismiss. The action has been commenced by a doctor presently domiciled in the state of California against the Regents of the University of Nebraska and a professor on the University of Nebraska faculty, who is also chairman of the Department of Orthopedic Surgery. The basis for the action is a letter written by Dr. Connolly, the professor, to the Director of Medical Education at Denver's Presbyterian Hospital.

Dr. Connolly's letter states that the Plaintiff has "not been recommended for Board eligibility." It is Plaintiff's theory that publication of this letter results in defamation, breach of contract, interference with prospective advantage, outrageous conduct, and the deprivation of property and liberty rights protected by the federal constitution.

Defendants seek dismissal of the complaint upon grounds of immunity and upon lack of *in personam* jurisdiction. The Regents claim to be an agency of the state of Nebraska protected by the eleventh amendment. Dr. Connolly claims the same immunity, stating he was acting, in this case, as the state's alter ego. Both Defendants further claim their minimal contacts with the state of Colorado render suit in this district an impediment to their due process rights.

Plaintiff counters these arguments first by claiming he would be without redress if the eleventh amendment were applied. He further argues Nebraska law would deny his right to sue these Defendants on his defamation claims.[1]

It seems clear to me, first, that whether the Regents are an agency of the state of Nebraska is principally dependent upon the state law. *Hamilton Mfg. Co. v. Trustees of State Colleges,* 356 F.2d 599 (10th Cir. 1966). Since the question of whether the Regents are an agency of the state of Nebraska has been answered affirmatively, *Catania v. University of Nebraska,* 282 N.W.2d 27 (Neb. 1979), the only remaining question as far as the Regents are concerned is whether the eleventh amendment immunity applies in all respects to the claims raised against them here. That question also must be answered affirmatively. *United Carolina Bank v. Regents Stephen F. Austin State University, et al.,* 665 F.2d 553 (5th Cir. 1982); *Lecompt v. University of Houston System, et al.,* 535 F. Supp. 317 (S.D. Tex. 1982); *Harris v. Arizona Board of Regents, et*

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[1]Neither ground appears to me to be a valid basis for extending jurisdiction. *See United Carolina Bank v. Regents,* 655 F.2d 553 (5th Cir. 1982).

al., 528 F. Supp. 987 (D. Ariz. 1981); *Beckley v. University of Maryland, et al.,* 527 F. Supp. 174 (D. Md. 1981). It is thus evident the Defendant Regents are immune to this action, and the complaint against them must be dismissed.

As far as Dr. Connolly is concerned, I am loath at this moment to say he is vested with eleventh amendment immunity for the simple reason the amended complaint cannot be read only as the Defendant suggests. Taking the averments pertinent to Dr. Connolly in a light most favorable to the Plaintiff, I must conclude there are indications that recovery is sought against Dr. Connolly for his individual acts that would not be in the scope of his acting as and for the state. Hence, were he otherwise subject to unqualified immunity as the state's alter ego, there is a sufficient claim against Dr. Connolly to get the Plaintiff past the eleventh amendment. Nothwithstanding, the complaint against him should be dismissed for other reasons

Dr. Connolly has moved to dismiss on Rule 12 (b) (4) and (5) grounds. I believe the motion leads to the question of whether the case should be dismissed for lack of *in personam* jurisdiction. *Federal National Bank & Trust Co. v. Moon,* 412 F. Supp. 644 (D. Okla. 1976).

In this case I have considered whether Dr. Connolly ought to be made to defend this action in Colorado. It is clear that if a tort of defamation was committed, the publication element of that tort occurred here in Colorado, thus technically bringing this action within the reach of Colorado's long-arm statute, 1973 Colo. Rev. Stat. § 13-1-124 (1) (b). However, that statute cannot be read in a vacuum, and the due process clause requires certain "min-

imum contacts." *International Shoe Co. v. Washington,* 326 U.S. 310 (1945).

As established in *International Shoe,* insufficient contacts offend "traditional notions of fair play and substantial justice." *Id.* at 316. The standard is whether the Defendant could reasonably anticipate being haled into court in this forum. *Le Manufacture Francaise v. District Court,* 620 P.2d 1040 (1980), *citing, inter alia, Worldwide Volkswagen v. Woodson,* 444 U.S. 286 (1980). I cannot conceive the thought a university professor, writing in response to a request for a recommendation concerning a former student who could be applying for a job anywhere in the world, should reasonably be expected to defend an action wherever he sends his response.

Further, I find that is is more reasonable in this action to quash service and dismiss the complaint because I cannot see that this action can continue in federal court. *Sykes v. Beal,* 392 F. Supp. 1089 (D. Conn. 1975). Moreover, even if it were to continue, I do not believe this is the proper forum. Courts generally consider, among other factors, the interest of the state in providing a forum for its residents and the convenience of the parties. As the Plaintiff is no longer even a Colorado resident, he can as easily bring whatever action he might have against Dr. Connolly in Nebraska. Accordingly, it is

ORDERED that Defendants' motion to dismiss is granted, and the complaint and cause of action are dismissed. Each party shall pay his or its own costs.

DATED at Denver, Colorado, this 1st day of October, 1982.

BY THE COURT:
/s/ John P. Moore,
Judge, United States District Court

APPENDIX C

(logo)

PRESBYTERIAN DENVER HOSPITAL
a division of Presbyterian/Saint Luke's Medical Center

1719 East 19th Avenue - Denver, Colorado 80218 -
(303) 839-6000

October 14, 1980

John T. Connolly, M.D.
Program Director
Department of Orthopedics
University of Nebraska Medical Center
42nd and Dewey Avenue
Omaha, Nebraska 68105

Dear Dr. Connolly:

Dr. Andrew K. Burt has made application for staff membership at Vail Valley Community Hospital through Presbyterian Denver Hospital. He states that he had an orthopedic residency at the University of Nebraska. We would appreciate your confirming the above, as well as any other information you might have regarding his medical knowledge, technical proficiency, medical judgment, personal habits, morals, ethics, etc.

Your answer will be confidential.

Sincerely,

/s/ Michael A. Lubchenco, M.D.

Director of Medical Education

MAL:mfw

APPENDIX D

THE UNIVERSITY OF
NEBRASKA MEDICAL CENTER
42nd and Dewey Avenue
Omaha, Nebraska 68105

Department of Orthodpaedic Surgery
and Rehabilitation
(402) 599-4287

John F. Connolly, M.D.
Chairman
Joel Adams, M.D.
Ed Simodynes, M.D.
Chief Residents

CHILDREN'S ORTHOPAEDICS
Walter W. Huurman, M.D.

FRACTURES AND ADULT
RECONSTRUCTIVE SURGERY
John F. Connolly, M.D.
O. Max Jardon, M.D.

HAND AND MICROVASCULAR
SURGERY
Robert M. Cochran, M.D.
Michael Whalen, P.A.C.

ORTHOPAEDIC RESEARCH
Louis Lippiello, Ph.D.
Dennis Chakkalakal, Ph.D.

SPORTS MEDICINE—ATHLETIC
INJRIES
W. Michael Walsh, M.D.
Guy Shelton, R.P.T., A.T.C.

Mrs. Elizabeth A. Tretter
Administrative Assistant

October 21, 1980
Michael A. Lubchenco, M.D.

Director of Medical Education
Presbyterian Denver Hospital
1719 East 19th Avenue
Denver, Colorado 80218

RE: Andrew Kelly Burt, M.D.

Dear Doctor Lubchenco:

In reply to your inquiry about Doctor Burt, he did spend time here as an Orthopaedic Resident from 1974-1977. His performance was well below average and he has consequently not been recommended for Board eligibility. I think he might serve adequately in some field of medicine but not that of Orthopaedic Surgery.

Yours truly,

/s/ John F. Connolly, M.D.

Professor and Chairman

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